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16 UNITED STATES OF AMERICA

17 UNITED STATES DISTRICT COURT

18 FOR THE CENTRAL DISTRICT OF CALIFORNIA

19 UNITED STATES OF AMERICA,) No. CR 11-841-DSF
20 Plaintiff,)
21 v.) GOVERNMENT'S MOTION IN LIMINE
22 ROBERT GLENN JOHNS and) RE PROPER SCOPE OF SELF-DEFENSE
23 JASON KNOLES,) AND EVIDENCE OF CHARACTER OF
24 Defendants.) VICTIM; MEMORANDUM OF POINTS
25) AND AUTHORITIES
26) Hearing Date: February 9, 2012
27) Hearing Time: 2:30 p.m.
28)
29) Trial Date: February 21, 2012
30) Trial Time: 8:30 a.m.
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motion for an order concerning the scope of defendants' presentation of evidence or argument in support of a claim of self-defense and the admissibility of evidence concerning the victims' characters and its effect on the admissibility of evidence of the defendants' characters.

This motion is based on this notice, the attached memorandum of points and authorities, all documents and records previously filed in this matter, and such additional evidence or argument that the Court may wish to consider or direct the government to submit.

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/s/

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

4 For the reasons set forth below, the government requests an
5 order restricting defendants' presentations of evidence or
6 argument in support of a claim of self-defense or duress to the
7 legally cognizable scope of those defenses. The government also
8 seeks an order concerning the scope of admissible character
9 evidence should a defendant place his own character in issue by
10 presenting evidence of the character of a victim. Although
11 neither defendant has yet produced any reciprocal discovery or
12 announced an intent to pursue a claim of self defense, both
13 defendants have sought discovery related to past assaults
14 committed by the victims in this case and counsel for defendant
15 Jason Knoles has indicated that he may seek a continuance of the
16 trial date to investigate the past assaults by the victims. As
17 set forth below, the government believes that facts in this case
18 do not support a claim of self defense and that, furthermore, the
19 Rules of Evidence will not allow defendants to present evidence
20 regarding specific incidents of past conduct by the victims.
21 Therefore, the government hopes that early resolution of this
22 motion will moot defendant Knoles' reasons for a continuance and
23 allow the trial to proceed as scheduled.

11

BACKGROUND

27 Count One of the indictment charges defendants Robert Glenn
28 Johns ("defendant JOHNS") and Jason Knoles ("defendant KNOLES")

1 with assault with the intent to commit murder, in violation of 18
 2 U.S.C. § 113(a)(1). Count Two charges defendant JOHNS and
 3 defendant KNOLES with assault with a dangerous weapon with intent
 4 to cause bodily harm, in violation of 18 U.S.C. § 113(a)(3).¹
 5 Counts One and Two of the two-count indictment relate to
 6 defendants' July 28, 2011 attempted murder of United States
 7 Bureau of Prisons ("BOP") inmates P.M. and C.T. at United States
 8 Penitentiary in Victorville, California ("USP Victorville").

9 Both defendants are members of a white supremacist gang, the
 10 California Boys Aryan Brotherhood. Victims P.M. and C.T. are
 11 both members of the Texas Aryan Brotherhood. On July 28, 2011,
 12 both defendants and both victims were inmates at USP Victorville.
 13 The assaults took place in housing unit 6B and were captured on
 14 video surveillance.

15 At approximately 5:52 P.M. on July 28, 2011, video
 16 surveillance shows P.M. and C.T. standing near the railing on the
 17 second floor, in proximity to each other. There is a clear image
 18 of C.T. walking to the railing and leaning over it, so that his
 19 elbows are over the railing and his hands are clasped, a relaxed
 20 position. Defendants KNOLES and JOHNS approach C.T. and P.M.
 21 P.M. begins running away almost immediately.² Defendant KNOLES

22
 23 ¹ Count Two additionally charged John Javilo McCullah
 24 ("defendant McCullah") with assault with a dangerous weapon with
 25 intent to do bodily harm. On October 25, 2011, the Court granted
 26 the government's motion to dismiss the case as to defendant
 27 McCullah. Accordingly, this motion does not discuss defendant
 28 McCullah's conduct.

29 ²In a statement following the incident, C.T. admitted that
 he was a little naive and did not realize what was going on as
 quickly as P.M. did.

1 pursues him, down the stairs to the first floor. Once on the
2 first floor, defendant KNOLES catches up to P.M. and stabs him
3 repeatedly with a knife. The video surveillance shows P.M.
4 taking a defensive position toward defendant KNOLES and
5 repeatedly trying to escape the reach of defendant KNOLES, but
6 KNOLES continues to assault P.M. By the end of the assault, P.M.
7 is on the floor in a fetal position while defendant KNOLES
8 continues to stab him. P.M. sustained approximately 26 stab
9 wounds to his side, back, stomach, and neck.

10 At the approach of the defendants, C.T. does not flee
11 immediately. The video surveillance reflects C.T. leaning back
12 in a defensive position upon approach by defendant JOHNS.
13 Defendant JOHNS stabs C.T. several times. C.T. manages to break
14 away and runs down the stairs. Defendant JOHNS pursues him. On
15 the first floor, defendant JOHNS temporarily stops his pursuit of
16 C.T. to join in the attack on P.M. Then, defendant JOHNS resumes
17 his assault of C.T. During the entire attack, C.T. alternates
18 between trying to defend himself and running away from defendant
19 JOHNS. Even after BOP Officers intervene and escort defendant
20 JOHNS through the unit, JOHNS breaks away from officers to kick
21 C.T. (who is lying on the ground) in the head. This later
22 assault is captured on the video surveillance and takes place
23 approximately 3 minutes after the stabbing. C.T. sustained stab
24 wounds to his back, torso, and head.

25 According to an evaluation conducted by the BOP after the
26 assault, defendant JOHNS reported no injuries. Staff observed
27 minor contusions on his face and minor abrasion on his trunk and
28 knees. No written evaluation of KNOLES has been located; however

1 a form record of the incident reflects that the level of medical
2 attention required could be provided at the institutional level.
3 In contrast, both victims were transported via air ambulance to
4 local trauma centers, due to the extent of their life-threatening
5 injuries. Homemade weapons were recovered from both defendants
6 -- one from defendant JOHNS as he held it and one from defendant
7 KNOLES after it fell to the floor after he tried to place it
8 inside his pants. Both weapons were fashioned after knives, with
9 sharpened metal blades and attached handles of a non-metal,
10 graspable material.

III

DISCUSSION

A. A MOTION IN LIMINE IS AN APPROPRIATE MEANS FOR TESTING THE SUFFICIENCY OF A PROFFERED DEFENSE

15 A motion is an appropriate means for testing the sufficiency
16 of a proffered defense and seeking preclusion of evidence
17 concerning the proffered defense if the evidence to be offered by
18 a defendant in support of the defense is found to be insufficient
19 or if the defense is precluded as a matter of law. United States
20 v. Shapiro, 669 F.2d 593, 596-97 (9th Cir. 1982); United States
21 v. Peltier, 693 F.2d 96, 97-98 (9th Cir. 1982) (per curiam); Fed.
22 R. Crim. P. 12(b)(2) ("Any defense, objection, or request which
23 is capable of determination without the trial of the general
24 issue may be raised before trial by motion."); see also Fed. R.
25 Crim. P. 12(e). Generally, such motions are capable of pre-trial
26 determination if they raise issues of law, rather than issues of
27 fact. United States v. Jones, 542 F.2d 661, 664 (6th Cir. 1976).
28 A number of courts have specifically approved the pre-trial

1 exclusion of evidence relating to affirmative defenses which were
 2 not supported by sufficient offers of proof or precluded as a
 3 matter of law. See United States v. Bailey, 444 U.S. 394 (1980);
 4 United States v. Kinslow, 860 F.2d 963, 966 (9th Cir. 1988);
 5 Peltier, 693 F.2d at 98; Shapiro, 669 F.2d at 596.

6 B. AS A MATTER OF LAW, DEFENDANTS SHOULD BE PRECLUDED FROM
 7 ASSERTING A CLAIM OF SELF-DEFENSE

8 Given the video recordings and other evidence that
 9 defendants were the aggressors in the assaults, defendants will
 10 be unable to make any bare minimum showing necessary to raise a
 11 claim of self-defense, and should therefore be precluded from
 12 making such a claim, including in opening statement.

13 1. Legal Standard

14 The elements of self-defense, properly defined, are: (1) a
 15 reasonable belief that the use of force was necessary to defend
 16 himself or another against the immediate use of unlawful force;
 17 and (2) the use of no more force than was reasonably necessary
 18 under the circumstances. See Ninth Cir. Model Jury Instr,
 19 (Crim.) No. 6.8 [Self-Defense] (2010 ed.); United States v.
 20 Biggs, 441 F.3d 1069, 1071 (9th Cir. 2006); United States v.
 21 Keiser, 57 F.3d 847, 851 (9th Cir. 1995) ("The model instruction
 22 accurately states the elements of self-defense and defense of
 23 another in this Circuit."). In addition, a defendant's use of
 24 force likely to cause death or great bodily harm is justified in
 25 self-defense only if defendant reasonably believed that such
 26 force was necessary to prevent death or great bodily harm. Id.

27 "As a general proposition a defendant is entitled to an
 28 instruction as to any recognized defense for which there exists

1 evidence sufficient for a reasonable jury to find in his favor."

2 Mathews v. United States, 485 U.S. 58, 63 (1988) (citing

3 Stevenson v. United States, 162 U.S. 313 (1896)). In United

4 States v. Bailey, the Supreme Court held: "[I]t is essential that

5 the testimony given or proffered meet a minimum standard as to

6 each element of the defense so that, if a jury finds it to be

7 true, it would support an affirmative defense...." 444 U.S. 394,

8 415 (1980). Without such a showing, "the trial court and jury

9 need not be burdened with testimony supporting other elements of

10 the defense," and defendants are not entitled to turn this trial

11 "into a hearing on the current state of the federal penal

12 system." Id. at 416-17.

13 Accordingly, if defendants are unable to make a showing as

14 to all of the necessary elements of self-defense, i.e., the

15 elements of immediacy and the use of no more force than

16 reasonably necessary, evidence that would only be relevant as to

17 other elements of self-defense should be excluded from trial.

18 Without evidence that could support a finding as to each of the

19 elements of self-defense, evidence in support of the other

20 elements of self-defense: (1) would not meet the definition of

21 "relevant evidence," which limits the scope of relevant

22 evidence to that evidence that has a tendency to make more

23 probable or less probable the existence of any fact that is of

24 consequence to the determination of the action, Fed. R. Evid.

25 401; and (2) could only serve to confuse the issues to be

26 tried, mislead the jury, and waste time, Fed. R. Evid. 403.

27 //

28

1 2. Defendants Cannot Meet the Elements of Immediacy Or
2 Reasonably Necessary Use of Force

3 Neither defendant can proffer any evidence from which a
4 rational juror could conclude that either defendant, at the time
5 of the attacks against victims P.M. and C.T., was defending
6 himself against the "immediate use of unlawful force" or that
7 either defendant "use[d] no more force than appears reasonably
8 necessary under the circumstances." Given that the force
9 defendants used against the victims was obviously "likely to
10 cause death or great bodily harm," defendants would need to
11 demonstrate that the immediate threat posed by the victims was a
12 threat of death or great bodily harm, which they also cannot do.

13 As summarized above, the video recordings and other evidence
14 demonstrate that the defendants aggressively pursued the victims,
15 ran after them as the victims fled down the stairs, and stabbed
16 them repeatedly. Defendant KNOLES continued to stab P.M. even
17 when P.M. was on the floor, curled into a fetal position.
18 Defendant JOHNS broke off from his pursuit of C.T. to attack
19 P.M., then returned to his assault of C.T., continuing the
20 assault even when C.T. was lying on the floor and defendant JOHNS
21 was surrounded by correctional officers. No weapons were
22 recovered from the victims and their injuries were much more
23 severe than those of the defendants.

24 At no time during the assaults does either of the victims
25 display any weapon or appear to provoke either defendant JOHNS or
26 defendant KNOLES in any way. Indeed, each victim attempts to run
27 away from his assailant, down the stairs to another level, and is
28 followed and further assaulted. There is thus no evidence that

1 the victims posed any immediate threat to defendants, and even if
2 there were some assault or provocation by the victims not
3 captured by the video or observed by the correctional officers
4 on-duty, the use of weapons by the defendants against the unarmed
5 victims nullifies any claim that the use of force was no more
6 than reasonably necessary under the circumstances.

7 In the absence of sufficient evidence supporting each of the
8 indispensable elements of the affirmative defense, defendants
9 should not be permitted to offer evidence or otherwise make
10 reference to facts or evidence relevant to any element of self
11 defense, including, for example, claims that the defendants
12 feared gang violence from the victims, or that the victims had
13 reputations for violence or committed prior specific acts of
14 violence. Furthermore, without evidence to support a finding of
15 self-defense, defendants should not be entitled to a self-defense
16 instruction and should not be permitted to present such a defense
17 or make reference in opening statement, through the questioning
18 of witnesses or the presentation of other evidence, or in
19 argument, to self-defense.

20 3. Defendants Cannot Make a Claim of "Preemptive" or
"Preventative" Self-Defense

22 Defendants may seek to put on a defense based on preemptive
23 or preventative self-defense, claiming that they assaulted the
24 victims to keep from being assaulted or killed in the future.
25 Inquiries by defense counsel about prior conduct and gang status
26 of the victims suggest that this will be the defense strategy at
27 trial. However, there is no "law of the jungle defense" in
28 prison assault and attempted murder cases such as this. Courts

1 of the United States also do not recognize the concept of
2 "preemptive" or "preventative" self-defense and have refused to
3 permit the presentation of such claims as, essentially, requests
4 for jury nullification in the guise of a legitimate defense.
5 See, e.g., United States v. Haynes, 143 F.3d 1089, 1090-91 (7th
6 Cir. 1998).

7 In rejecting defense requests that the jury be instructed on
8 self-defense, imperfect self-defense, and duress in a RICO and
9 VICAR murder case brought against several Aryan Brotherhood
10 ("AB") members, the Honorable David O. Carter, United States
11 District Judge for the Central District of California, wrote
12 about a claim of "self-defense" similar to that apparently being
13 advanced here:

14 Defendants' conduct can most generously be
15 characterized as preventive self-defense, a concept
16 that finds no support in state or federal law.^[3]
17 Preventive self-defense is an offensive concept,
18 properly understood to constitute aggression, and is,
19 in fact, the opposite of defense. To endorse
20 preventive self-defense in the prison context would be
21 to transform correction institutions into combat zones,
22 in which legal sanction is granted to inmates who would
23 sooner kill a potential enemy than seek assistance from
24 the prison administration.

25 United States v. Slocum, 486 F. Supp. 2d 1104, 1109-10 (C.D. Cal.
26 2007). Judge Carter also referenced Judge Easterbrook's opinion
27 in United States v. Haynes:

28 ³ Judge Carter also recognized that "preventive self-
29 defense" is also "[im]permissible under international law."
30 Slocum, 486 F. Supp. 2d at 1109 n.2 (citing International
31 Military Tribunal (Nuremberg) Judgment and Sentences, Oct. 1,
32 1946, reprinted in 41 Am. J. Int'l L. 172, 205 (1947)
33 ("Preventive action in foreign territory is justified only in the
34 case of an instant and overwhelming necessity for self-defense,
35 leaving no choice of means and no moment for deliberation.")
36 (internal quotation marks omitted)).

1 Under the law of the jungle a good offense may be the
2 best defense. But although prisons are nasty places,
3 they are not jungles -- and it is the law of the United
4 States rather than Hobbes' state of nature that
5 regulates inmates' conduct.

6 . . .

7 If prisoners could decide for themselves when to seek
8 protection from the guards and when to settle matters
9 by violence, prisons would be impossible to regulate.
10 The guards might as well throw the inmates together,
11 withdraw to the perimeter, and let them kill one
12 another

13 *Id.* at 1110 (quoting Haynes, 143 F.3d at 1090 and citing Anthony
14 Simones, Applying Nineteenth Century Ideas to a Twenty-First
15 Century Problem: The Law of Self-Defense and Gang-Related
16 Homicide, 20 S. Ill. U. L.J. 589, 604 (1996) ("To adopt the law
17 of the jungle is not to refine the concepts of self-defense; it
18 is to abrogate them.")).

19 In the instant case, defendants armed themselves with
20 prison-made knives and attacked two unarmed men, C.T. and P.M.,
21 even as the victims ran away, down a flight of stairs, to escape.
22 The attacks are captured on video, including the brutal assaults
23 made on the victims even after each had fallen to the floor --
24 defendant KNOLES continuing to stab P.M. after he was in a fetal
25 position and defendant JOHNS kicking C.T. after C.T. had been
26 lying on the floor for several minutes. As explained in the
27 previous section, neither defendant can make any claim that he
28 held "a reasonable belief that the use of force was necessary to
 defend himself or another against an immediate use of force" or
 that either used "no more force than was reasonably necessary
 under the circumstances." These elements of self-defense do not
 change even if defendants allege some latent fears about violent
 acts by the victims or preexisting gang warfare.

1 Because no reasonable jury could find that defendants were
2 not the aggressors in the assaults on P.M. and C.T., defendants
3 will not be entitled to a self-defense instruction. They also
4 should not be permitted to present what is in reality a jury
5 nullification "defense" in the guise of "preventative" or
6 "preemptive self-defense," either in opening statement, through
7 the questioning of witnesses or the presentation of other
8 evidence, or in argument.

9 C. EVIDENCE OF THE VICTIMS' CHARACTER FOR VIOLENCE MAY ONLY BE
10 RECEIVED IN THE FORM OF REPUTATION OR OPINION AND NOT IN THE
11 FORM OF SPECIFIC INSTANCES OF VIOLENT CONDUCT

12 Counsel for defendant KNOLES has indicated that he seeks to
13 conduct a more in-depth investigation into prior assaults by the
14 victims. Counsel for defendant JOHNS has also sought discovery
15 into the history of the victims. Although the Federal Rules of
16 Evidence allow defendants to proffer character evidence about
17 victims in assault cases where self defense is at issue, the
18 Rules of Evidence limit the means through which this character
19 evidence may be offered. Character of the victim is not an
20 essential element of any claim or defense in the instant case.
21 Therefore, defendants cannot proffer specific acts of violence by
22 the victims to prove character, and such acts have no other
23 relevance.

24 Federal Rule of Evidence 404(a) provides that, subject to
25 specific exceptions, "[e]vidence of a person's character or a
26 trait of character is not admissible for the purpose of proving
27 action in conformity therewith on a particular occasion." Fed.
28 R. Evid. 404(a). One of the exceptions to the general rule is
that "[i]n a criminal case . . . evidence of a pertinent trait of

1 character of the alleged victim of the crime offered by an
 2 accused, or by the prosecution to rebut the same." Fed. R. Evid.
 3 404(a)(2). Where a defendant charged with an assault asserts a
 4 claim of self-defense, the victim's "violent disposition" is "the
 5 sort of evidence this rule was intended to encompass." United
 6 States v. Keiser, 57 F.3d 847, 853 (9th Cir. 1995) (citing
 7 Advisory Committee note to Rule 404 ("Illustrations are: evidence
 8 of a violent disposition to prove that the person was the
 9 aggressor in an affray . . ."). Moreover, a defendant's
 10 "personal knowledge" of the victim's propensity for violence is
 11 simply not a prerequisite for admission of victim character
 12 evidence under Rule 404(a)(2)." Id. at 855.

13 Once a court determines that character evidence is
 14 admissible under Rule 404, however, it must next turn to Federal
 15 Rule of Evidence 405 to determine what form that evidence may
 16 take. Id. at 855. Rule 405, entitled "Methods of Proving
 17 Character," provides:

18 (a) Reputation or opinion. In all cases in which
 19 evidence of character or a trait of character of a
 20 person is admissible, proof may be made by testimony as
 21 to reputation or by testimony in the form of an
 22 opinion. On cross-examination, inquiry is allowable
 23 into relevant specific instances of conduct.

24 (b) Specific instances of conduct. In cases in which
 25 character or a trait of character of a person is an
 26 essential element of a charge, claim, or defense, proof
 27 may also be made of specific instances of that person's
 28 conduct.

Fed. R. Evid. 405. In terms of the "form of the evidence" of a
 victim's "violent disposition," the Ninth Circuit has held that
 "only reputation or opinion evidence is proper to show that the
 victim of an assault had a propensity toward violence." Keiser,

1 57 F.3d at 855 (citing Fed. R. Evid. 405(a)). As the court in
2 Keiser recognized, evidence of a victim's character for violence
3 does not establish an essential element of a charge, claim, or
4 defense, and proof of character by specific instances of the
5 victim's conduct is accordingly not admissible.⁴

6 Accordingly, should either defendant choose to place in
7 issue the character of either of the victims, he may present
8 evidence of the victim's character only through reputation or
9 opinion evidence, and proof of character by specific instances of
10 the victim's conduct is accordingly not admissible.

11 D. PLACING IN ISSUE THE PROPENSITIES AND CHARACTER OF THE
12 VICTIM PLACES IN ISSUE A DEFENDANT'S OWN PROPENSITIES FOR
VIOLENCE

13 By placing in issue a victim's character under Rule
14 404(a)(2), a defendant also places in issue his own character,
15 under Federal Rule of Evidence 404(a)(1). Rule 404(a)(1)
16 recognizes the admissibility of evidence, "[i]n a criminal case,
17 . . . if evidence of a trait of character of the alleged victim
18 of the crime is offered by an accused and admitted under Rule 404
19 (a)(2), evidence of the same trait of character of the accused
offered by the prosecution." Fed. R. Evid. 404(a)(1). Once

21
22 ⁴ In Keiser, the Ninth Circuit held:

23 The relevant question should be: would proof, or
24 failure of proof, of the character trait by itself
25 actually satisfy an element of the charge, claim, or
defense? If not, then character is not essential and
evidence should be limited to opinion or reputation.

26 Id. at 856. "[W]ith respect to a crime, the [district court is
27 to] look to the indictment or an authoritative statement of the
claimed defense. The inquiry would be legal rather than factual,
categorical rather than particular to the case at hand." Id. n.
28 20.

1 evidence of a victim's character for violence has been placed in
2 issue by a defendant, the defendant's character for violence
3 therefore also becomes an issue. Depending on the manner in
4 which a defendant chooses to place his propensity for violence in
5 issue, he may -- and, here, almost certainly would -- open the
6 door to the government's presentation of evidence of specific
7 instances of that defendant's conduct that might not otherwise be
8 admissible.

9 IV

10 CONCLUSION

11 For the reasons discussed above, the government requests an
12 order restricting defendants' presentations of evidence of "self-
13 defense" to that allowed under Ninth Circuit law and precluding
14 defendant from offering any opening statement, evidence, or
15 argument concerning a "preemptive" or "preventative self-
16 defense."

17 The government further requests an order restricting the
18 presentation of evidence concerning the character of either of
19 the victims to reputation and opinion evidence only and
20 precluding either defendant from offering any evidence of
21 specific instances of violent conduct by either of the victims.

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